

No. 16308

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United States  
Court of Appeals  
for the Ninth Circuit

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ESTATE OF MARY JANE LITTLE, Deceased,  
BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION, Executor,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax  
Court of the United States

FILED

MAR 16 1959

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 14, California,

Attorneys for Petitioner.

CHARLES K. RICE,

Assistant U. S. Attorney General,

LEE A. JACKSON,

Attorney,

Department of Justice,

Washington 25, D. C.,

Attorneys for Respondent.



Tax Court of the United States

Docket No. 58688

ESTATE OF MARY JANE LITTLE, Deceased,  
BANK OF AMERICA, NATIONAL TRUST  
AND SAVINGS ASSOCIATION, Executor,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DOCKET ENTRIES

1955

July 1—Petition received and filed. Taxpayer notified. Fee paid.

July 5—Copy of petition served on General Counsel.

Aug. 15—Answer filed by General Counsel.

Aug. 15—Request for hearing in Los Angeles, Calif., filed by General Counsel.

Aug. 17—Notice issued placing proceeding on Los Angeles, Calif., calendar. Service of Answer and Request made.

Oct. 4—Leave granted to file reply. Reply to answer filed by petitioner. 10/5/55—copy served.

1957

Apr. 2—Hearing set June 3, 1957—Los Angeles, Calif.

1957

May 3—Notice of appearance of William L. Kumber and Wilson B. Copes as counsel filed.

May 7—Notice of change of beginning date to June 4, 1957, Los Angeles, Calif.

June 6—Hearing had before Judge Mulroney on the merits. Written motion of counsel for respondent to file amendment to answer filed at hearing and granted. Oral motion of counsel for petitioner to file reply—Stipulation of facts filed. Petitioner's brief due 9/4/57; Respondent's brief due 12/3/57; Petitioner's reply brief due 1/17/58.

June 27—Transcript of Hearing 6/6/57 filed.

Aug. 26—Motion by petitioner for extension of time to Oct. 4, 1957 to file brief. Granted 8/26/57. Served 8/26/57.

Sept. 30—Motion by petitioner for extension of time to Nov. 6, 1957 to file brief. Granted 9/30/57. Served 10/2/57.

Nov. 5—Brief for Petitioner filed. Served 11/7/57.

1958

Feb. 3—Motion by respondent for extension of time to Mar. 10, 1958 to file brief in answer. Granted 2/4/58. Served 2/7/58.

Mar. 10—Motion by respondent for extension of time to Mar. 31, 1958 to file brief in answer. Granted 3/11/58.

Mar. 31—Reply Brief filed. Served 4/2/58.

May 1—Motion by petitioner for extension of time to June 2, 1958 to file reply brief. Granted 5/1/58.

1958

June 2—Reply brief for petitioner filed. Served 6/4/58.

July 21—Opinion filed. Judge Mulroney. Decision will be entered for the Respondent. Served 7/21/58.

July 21—Decision entered. Judge Mulroney.

Sept. 30—Petition for Review by U.S.C.A. 9th Cir. filed by petitioner.

Oct. 3—Proof of service of petition for review filed.

Oct. 29—Designation of Contents of Record on Review with proof of service thereon filed by petitioner.

Oct. 31—Order extending time for filing record on review and docketing petition for review to December 29, 1958. Served 11/4/58.

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[Title of Tax Court and Cause.]

### PETITION

The above named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:LA:AA:KD-HT 90D:HNR) dated April 7, 1955, and as a basis of its proceeding alleges as follows:

1. The petitioner, Bank of America National Trust and Savings Association, a national banking institution organized under the laws of the United

States, is the duly appointed and acting Executor of the Estate of Mary Jane Little, deceased. The address of the petitioner is 660 South Spring Street, Los Angeles 14, California. The income tax returns of Mary Jane Little, then living, for the periods here involved were filed with the collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on or about April 7, 1955.

3. The deficiencies as determined by the Commissioner are in income taxes of Mary Jane Little, now deceased, as follows:

1949 .....	\$22,899.07
1950 .....	23,909.64
1951 .....	29,912.41
1952 .....	30,731.00

All of said deficiencies are in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner erred in including in the gross income of Mary Jane Little for the calendar year 1949 fiduciary income in the sum of \$540.00.

b. The Commissioner erred in failing to allow as deductions under sections 23(l) and 23(m) of the Internal Revenue Code of 1939 depreciation and depletion in aggregate amounts as follows:

1949 .....	\$31,071.20
1950 .....	31,278.70
1951 .....	35,534.02
1952 .....	35,113.37

c. The Commissioner erred in determining that any possible deficiency in income taxes for the calendar year 1949 is assessable under the provisions of section 3801 of the Internal Revenue Code of 1939.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

a. Gloria D. Foster, daughter of Mary Jane Little (hereinafter called "decedent"), died on or about July 30, 1943, a resident of Dallas, Texas.

b. The last will and testament of said Gloria D. Foster was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943.

c. A large part of the estate of said Gloria D. Foster consisted of undivided interests in oil and gas producing properties and equipment.

d. The last will and testament of said Gloria D. Foster, after making certain specific bequests of cash and personal effects, devised the residue of her estate in trust, directing the trustees to pay out of the net income of her estate \$200.00 per month to Eva Culbertson for life, \$100.00 per month to Mrs. Jeremiah Foster for life (thereafter to Evelyn Foster for life) and the remaining amount to the decedent for life.

e. The testamentary trust so created was to terminate upon the death of the decedent and the corpus to be distributed to certain named individuals.



f. The trustees named in said last will and testament refused to serve as trustees and under a power granted to them under the terms of said last will and testament appointed Mercantile National Bank at Dallas, a national banking corporation, to act as trustee. Said Mercantile National Bank at Dallas accepted said appointment.

g. The last will and testament of said Gloria D. Foster contains no provision for the apportionment of the allowable deductions for depreciation and depletion as contemplated by sections 23(l) and 23(m) of the Internal Revenue Code of 1939.

h. During the years 1949, 1950, 1951 and 1952, among others, Mary Jane Little, decedent herein, was entitled to receive all the distributable income of the trust, except for \$3600 per year which was divided between two other lifetime beneficiaries.

i. The decedent reported such distributable income on her individual income tax returns for the appropriate years and deducted therefrom in computing her individual net taxable income that portion of the depletion and depreciation which bore the same ratio to the total depletion and depreciation attributable to the trust income as the income of the trust distributed or distributable to her bore to the total income of the trust.

j. The income tax return of the decedent for the calendar year 1949 was filed on or before March 15, 1950.

k. Neither the decedent (to the best information



and belief of petitioner) nor the petitioner has ever executed a Consent Fixing the Period of Limitation Upon Assessment of Income and Profits Taxes or in any other manner extended the period of limitation on assessment provided for in section 275(a) of the Internal Revenue Code for the calendar year 1949.

l. The decedent died on or about September 10, 1953.

m. The petitioner, Bank of America National Trust and Savings Association, a national banking institution, is the duly appointed and acting Executor of the Estate of Mary Jane Little, deceased.

Wherefore, the petitioner prays that this Court may hear this proceeding and determine (1) that Mary Jane Little, decedent, was entitled to deductions for depreciation and depletion for the years set forth in Paragraph 4(b) and in the amount set forth in said Paragraph 4(b), or in such other amounts as may be proper; and (2) that there are no income tax deficiencies due from petitioner for the calendar years 1949, or 1950, or 1951, or 1952.

/s/ HAROLD C. MORTON,  
/s/ JAMES M. McROBERTS,  
Attorneys for Petitioner.

Duly Verified.

EXHIBIT "A"

(Copy)

1250 Subway Terminal Building, 417 South Hill  
Street, Los Angeles 13, California

Ap: LA:AA:KD-HT  
90D:HNR

April 7, 1955

Estate of Mary Jane Little, Deceased  
Bank of America National Trust and Savings  
Association, Executor  
660 South Spring Street, Los Angeles 14, Calif.

Gentlemen:

You are advised that the determination of the income tax liability of Mary Jane Little, deceased, for the taxable years ended December 31, 1949, December 31, 1950, December 31, 1951, and December 31, 1952, discloses deficiencies aggregating \$107,452.12, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal

holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earliest.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue,

/s/ By H. L. DUCKER,

Associate Chief, Appellate Division

Enclosures: Statement, Form 1276, Agreement  
Form

TThaxton :vmc

Statement

Ap:LA:AA:KD-HT  
90D-HNR

(Copy)

Estate of Mary Jane Little, Deceased, Bank of America National Trust and Savings Association, Executor, 660 South Spring Street, Los Angeles 14, California.

Tax Liability for the Taxable Years Ended December 31, 1949,  
December 31, 1950, December 31, 1951, December 31, 1952

## INCOME TAX

	Deficiency
1949 .....	\$ 22,899.07
1950 .....	23,909.64
1951 .....	29,912.41
1952 .....	30,731.00
	<hr/>
	\$107,452.12

The determination of the income tax liability of Mary Jane Little, deceased, has been made upon the basis of information on file in this office.

In reporting taxable income received as beneficiary of the Gloria D. Foster Trust, the taxpayer claimed deductions for depreciation and depletion in the following amounts:

1949 .....	\$31,071.20
1950 .....	31,278.70
1951 .....	35,534.02
1952 .....	35,113.37

It is determined that all allowances for depreciation and depletion on the properties of the Gloria D. Foster Trust are deductible only by the trustee. The above deductions are accordingly disallowed.

It is determined that the deficiency with respect to the taxable year 1949 is assessable under the provisions of section 3801 Internal Revenue Code as applicable to that year.

A copy of this letter and statement has been mailed to your representative, Mr. James M. McRoberts, 523 West Sixth Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1949

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$ 69,434.93
Additional income:	
(a) Fiduciary income .....	\$ 540.00
(b) Depreciation and depletion .....	31,071.20      31,611.20
	<hr/>
Net income as corrected .....	\$101,046.13

EXPLANATION OF ADJUSTMENTS

(a) This adjustment was made to net income in the report of examination dated May 16, 1951, and has been agreed to by you.

(b) This adjustment has been previously explained herein.

## COMPUTATION OF TAX

Net income as corrected .....			\$101,046.13
Less: Exemptions (2) .....			1,200.00
			<hr/>
Amount subject to tax .....			\$ 99,846.13
Tentative tax .....			\$ 67,186.13
Less: Percentage reduction			
\$ 400.00 at 17% .....	\$	68.00	
66,786.13 at 12% .....		8,014.34	8,082.34
			<hr/>
Correct income tax liability .....			\$ 59,103.79
Assessed:			
Tax shown on original return,			
Acct. No. 9128014 .....	\$	35,834.06	
Additional July 26, 1951 .....		35,834.06	\$ 59,103.79
List, Acct. 7-510426 .....		370.66	36,204.72
			<hr/>
Deficiency of income tax .....			\$ 22,899.07

Taxable Year Ended December 31, 1950

## ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....			\$ 70,620.76
Additional income:			
(a) Depreciation and depletion .....			31,278.70
			<hr/>
Net income as corrected .....			\$101,899.46

## EXPLANATION OF ADJUSTMENTS

(a) This adjustment as been previously explained herein.

## COMPUTATION OF TAX

Net income as corrected .....			\$101,899.46
Less: Exemptions (2) .....			1,200.00
			<hr/>
Amount subject to tax .....			\$100,699.46
Tentative tax .....			\$ 67,942.52
Less: Percentage reduction			
\$ 400.00 at 13% .....	\$	52.00	
67,542.52 at 9% .....		6,078.83	6,130.83
			<hr/>
Correct income tax liability .....			\$ 61,811.69

Income tax liability disclosed by return, Acct. No. 3039224 .....	37,902.05
	<hr/>
Deficiency of income tax .....	\$ 23,909.64

Taxable Year Ended December 31, 1951

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$ 68,955.66
Additional income:	
(a) Depreciation and depletion .....	35,534.02
	<hr/>
Net income as corrected .....	\$101,489.68

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained herein.

COMPUTATION OF TAX

Net income as corrected .....	\$104,489.68
Less: Exemptions (3) .....	1,800.00
	<hr/>
Amount subject to tax .....	\$102,689.68
Tax on \$102,689.68 .....	\$ 70,189.82
Correct income tax liability .....	\$ 70,189.82
Income tax liability disclosed by return, Acct. No. 270004013 .....	40,277.41
	<hr/>
Deficiency of income tax .....	\$ 29,912.41

Taxable Year Ended December 31, 1952

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$ 79,356.63
Additional income:	
(a) Depreciation and depletion .....	35,113.37
	<hr/>
Net income as corrected .....	\$114,470.00

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained herein.



COMPUTATION OF TAX—1952

Net income as corrected .....	\$114,470.00
Less: Exemptions (3) .....	1,800.00
	<hr/>
Amount subject to tax .....	\$112,670.00
Tax on \$112,670.00 .....	\$ 81,619.00
Correct income tax liability .....	\$ 81,619.00
Income tax liability disclosed by return, Acct. No. 243002071 .....	\$ 50,888.00
	<hr/>
Deficiency of income tax .....	\$ 30,731.00

[Endorsed]: T.C.U.S. Filed July 1, 1955.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. a-c. Denies that respondent's determination is based upon errors as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. a-b. Admits the allegations of fact contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

c-h, inc. Admits the Mercantile National Bank at Dallas, Texas, accepted appointment as Trustee of the Gloria D. Foster Trust. Denies the remaining

allegations contained in subparagraphs (c) to (h), inclusive, of paragraph 5 of the petition.

i. Admits that in reporting the income that Mary Jane Little received for the years 1949, 1950, 1951 and 1952 as beneficiary of the Gloria D. Foster Trust, that she claimed certain deductions for depreciation and depletion in her returns, but respondent specifically denies that she was entitled to the deductions claimed, and further denies all remaining allegations contained in subparagraph (i) of paragraph 5 of the petition.

j. Admits the allegations contained in subparagraph (j) of paragraph 5 of the petition.

k. Denies the allegations contained in subparagraph (k) of paragraph 5 of the petition. Alleges that on October 26, 1953 the Tax Court entered its decision in the case of Mercantile National Bank of Dallas, Trustee of Gloria D. Foster Trust, Docket No. 44163, in a stipulated case, which decision had the effect of allowing the trust the entire deduction for depreciation and depletion for the year 1949. Alleges the decision became final after the lapse of the 90-day appeal period, or on January 25, 1954. Alleges the deductions claimed by the beneficiary (Mary Jane Little) here in Docket No. 58688 are duplications of part of the deductions allowed to the trust. Alleges that Section 3801 of the 1939 Internal Revenue Code, provides in substance that within a period of one year after the Tax Court's decision on a fiduciary case becomes final, a duplication of deduction in the case of a beneficiary may be



disallowed and assessed without regard to the expiration of other statutes of limitations. Alleges that in the case of this petitioner (the beneficiary of the trust), a consent was executed on December 21, 1954, extending to June 30, 1955, the statute of limitations with respect to the year 1949 (to the extent that the statutes or defenses had not accrued to the taxpayer as of that date). Alleges that under these circumstances that the deficiency proposed against the petitioner in the deficiency notice of April 7, 1955 with respect to the year 1949 is assessable under the provisions of Section 3801 as extended by the consent executed on December 21, 1954.

l-m. Admits the allegations contained in subparagraphs (l) and (m) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that this appeal be denied and that the respondent's determination be sustained.

/s/ JOHN POTTS BARNES,  
Chief Counsel, Internal Revenue  
Service.

Of Counsel: Melvin L. Sears, Regional Counsel; E. C. Crouter, Assistant Regional Counsel; R. E. Maiden, Jr., Special Assistant to the Regional

Counsel; Donald P. Chehock, Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed August 15, 1955.

[Title of Tax Court and Cause.]

### REPLY

The Estate of Mary Jane Little, Deceased, Bank of America National Trust and Savings Association, Executor, by its attorneys, Harold C. Morton and James M. McRoberts, for reply to the answer of the above named Respondent, admits, denies and alleges as follows:

5. k. Admits that the Tax Court entered its decision in the case of Mercantile National Bank of Dallas, Trustee of Gloria D. Foster Trust, Docket No. 44163, but Petitioner does allege that neither it nor the decedent, Mary Jane Little, were parties to said proceedings. Further answering subparagraph k. of paragraph 5., Petitioner does deny generally and specifically each and every other allegation of said subparagraph k. of paragraph 5. as set forth and contained therein.

Respectfully submitted,

/s/ HAROLD C. MORTON,

/s/ JAMES M. McROBERTS,

Attorneys for Petitioner.

Served October 5, 1955.

[Endorsed]: T.C.U.S. Filed October 4, 1955.

[Title of Tax Court and Cause.]

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the facts hereinafter stated shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce upon the trial of this case any other and further evidence not inconsistent with the facts herein stipulated.

1. The petitioner, Bank of America National Trust and Savings Association, is the duly appointed and acting Executor of the Estate of Mary Jane Little, deceased. The address of the petitioner is 660 South Spring Street, Los Angeles 14, California.

2. Mary Jane Little died on or about September 10, 1953, a resident of Los Angeles County, State of California.

3. For all years here involved Mary Jane Little filed her Federal income tax returns with the Collector of Internal Revenue for the Sixth District of California at Los Angeles (or the District Director of Internal Revenue, Los Angeles, California). Attached hereto and marked Exhibit 1-A is a copy of Mary Jane Little's 1949 Federal income tax return as filed, to which is appended a consent signed December 21, 1954, extending the statute of limitations to June 30, 1955. Attached hereto and marked Exhibits 2-B, 3-C and 4-D are copies of Mary Jane Little's 1950, 1951 and 1952 Federal income tax returns as filed.

4. Gloria D. Foster (daughter of Mary Jane Little) died on or about July 30, 1943, a resident of Dallas County, State of Texas.

5. For many years prior to her death, Gloria D. Foster conducted an oil business, owning, operating, developing and maintaining many producing oil and gas leases in the East Texas oil field. At the date of her death on July 30, 1943, Gloria D. Foster owned undivided interests in approximately eighty-four (84) producing oil wells in this field and in the physical equipment used in connection therewith. The oil income distributed to Mary Jane Little as beneficiary of the Gloria D. Foster Trust during the years here involved (from which the depletion and depreciation deductions here at issue were taken) was derived from these oil properties, or other subsequently acquired similar oil properties.

6. The Last Will and Testament of said Gloria D. Foster, deceased, was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943. A copy of said Will, marked Exhibit 5-E, is attached hereto and made a part hereof.

7. The trustees named in said Will accepted the trust established therein and allocated to the corpus of said trust so much of the income of the trust after operating expenses but prior to any deductions for depreciation and depletion as was equal to the amount of depreciation and depletion allowable for Federal income tax purposes with respect to such income.

8. For the purpose of settling a proposed contest of the aforementioned Gloria D. Foster Will by

Mary Jane Little, a Contract and Agreement was entered into on September 20, 1944, by and between the parties mentioned therein. A copy of such Contract and Agreement, marked Exhibit 6-F, is attached hereto and made a part hereof.

9. The Trust Agreement referred to in the aforesaid Contract and Agreement was thereafter executed under date of November 14, 1944, by all parties involved. (The Trust Agreement is designated as Exhibit D in Section 1, paragraph 3 of the Contract and Agreement, Exhibit 6-F.) Pursuant to the terms of said Contract and Agreement, L. C. Webster, Sol Goodell and T. A. Knight resigned as trustees and were succeeded by the Mercantile National Bank of Dallas as successor trustee. Attached hereto, marked Exhibit 7-G, is a copy of the said Trust Agreement of November 14, 1944.

10. Following the appointment of the Mercantile National Bank of Dallas as successor trustee, suit was filed on September 30, 1947, in the District Court of Dallas County, Texas, 68th Judicial District, by L. C. Webster, T. A. Knight and Sol Goodell against the Mercantile National Bank at Dallas (successor trustee), Mary Jane Little, Talbot Shelton and Wharton E. Weems (the latter two as assignees of a remainder interest in the trust properties acquired by Mary Jane Little under the settlement agreement of September 20, 1944), Ann Knight Bower and husband, J. R. Bower, Jr., Marian Knight Rowe and Fredrick E. Rowe, Jr. Attached hereto, marked Exhibit 8-H, is a copy of the pleadings and judgment in the suit above re-



ferred to, started September 30, 1947, between L. C. Webster et al vs. Mercantile National Bank at Dallas, Trustee, et al, No. 15622-C, 68th Judicial District of Dallas County, Texas. The original petition, filed September 30, 1947, is marked Exhibit 8-H(1); the answer to petition and cross-action of the defendants Ann Knight Bower et ux and Marian Knight Rowe et ux, filed October 6, 1947, is marked Exhibit 8-H(2); the original answer of defendant Wharton E. Weems to the petition, filed October 24, 1947, is marked Exhibit 8-H(3); the original answer of defendant Weems to the cross-action of Ann Knight Bower et al, filed October 24, 1947, is marked Exhibit 8-H(4); the answer of Mercantile National Bank at Dallas to the petition, filed October 27, 1947, is marked Exhibit 8-H(5); the answer of defendant Mary Jane Little to plaintiff's petition, filed November 10, 1947, is marked Exhibit 8-H(6); the original answer of defendant Mary Jane Little to cross-action of Ann Knight Bower et al, filed November 10, 1947, is marked Exhibit 8-H(7); the answer of defendant Shelton to petition, filed November 17, 1947, is marked Exhibit 8-H(8); the answer of defendant Shelton to cross-action of Ann Knight Bower et al, filed November 17, 1947, is marked Exhibit 8-H(9); the first amended original petition of plaintiffs, filed April 5, 1948, is marked Exhibit 8-H(10); the first amended answer of Mercantile National Bank at Dallas to plaintiffs' amended petition, filed April 5, 1948, is marked Exhibit 8-H(11); the answer of Ann Knight Bower et ux and Marian Knight Rowe et ux, to plaintiffs'

amended petition and cross-action filed April 5, 1948, is marked Exhibit 8-H(12); the answer of defendant Mary Jane Little to plaintiffs' amended petition, filed April 5, 1948, is marked Exhibit 8-H(13); the first amended original answer of defendant Mary Jane Little to cross-action of Ann Knight Bower et al, filed April 6, 1948, is marked Exhibit 8-H(14); the judgment of the Court of December 13, 1948, is marked Exhibit 8-H(15). The petitioner and respondent in this Docket No. 58688, of course, do not stipulate as facts any of the allegations contained in the court pleading documents, Exhibit 8-H. The court documents referred to above as Exhibit 8-H constitute the entire record of this proceeding in the Texas court.

11. Mary Jane Little in open court excepted to the judgment of December 13, 1948, and gave oral notice of appeal, but said appeal was not perfected by her, and said judgment became final.

12. Sproles & Woodard, Certified Public Accountants, of Fort Worth, Texas, were the accountants who kept the books and records of Gloria D. Foster, while living, and prepared her income tax returns. These same accountants continued to keep the books and prepare the income tax returns of the Gloria D. Foster estate and trust after her death during the entire period here involved. Deductions for depletion and depreciation have been claimed in the Federal income tax returns, throughout, consistent with the books of Gloria D. Foster, and the books of her estate and trust. The books of Gloria

D. Foster, while living, regularly and consistently made a charge against income and set up a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment in accordance with standard accounting principles. Subsequent to her death, the estate and trust have regularly and consistently set aside to corpus a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment. Depletion was computed on the basis of "cost" (which was the practice of Gloria D. Foster while living) by the executors and trustees from August 1943 to December 1946, and thereafter the trust has used "percentage" depletion. Attached hereto, marked Exhibit 9-I(1) through (6), respectively, are the financial statements submitted to the Gloria D. Foster Trust by Sproles & Woodard for the years 1946, 1947, 1948, 1949, 1950 and 1951. Attached hereto, marked Exhibits 10-J, 11-K, 12-L and 13-M, are copies of the Gloria D. Foster Trust Federal income tax returns as filed for the years 1949, 1950, 1951 and 1952, respectively.

13. On June 20, 1952 the Commissioner of Internal Revenue determined a deficiency in income tax of the Gloria D. Foster Trust for the year 1949 based on a disallowance of a portion of the depreciation and depletion claimed. After pleadings on the issue had been filed in the Tax Court a stipulation of no deficiency was filed and decision entered in accordance therewith on October 26, 1953 (which decision became final three months thereafter upon



expiration of the appeal period). The records of Mercantile National Bank at Dallas, Trustee of Gloria D. Foster Trust, Docket No. 44163, consisting of the petition, answer, stipulation and decision, marked respectively as Exhibit 14-N(1) through (4), are attached hereto and made a part hereof. The petitioner and respondent in this Docket No. 58688, of course, do not stipulate as facts any of the allegations contained in the court pleading documents, Exhibit 14-N.

/s/ WILLIAM L. KUMLER,

Counsel for Petitioner,

/s/ NELSON P. ROSE,

Chief Counsel, Internal Revenue Service, Counsel  
for Respondent.

[Endorsed]: T.C.U.S. Filed June 6, 1957.

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[Title of Tax Court and Cause.]

#### AMENDMENT TO ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, and for amendment to the answer to the petition filed in this case, alleges as follows:

Inserts at the end of paragraph 6 of the answer now on file (and prior to the Wherefore clause), the following:

7. Respondent further affirmatively alleges as follows:

a. The Executors of the Estate of Gloria D. Foster, deceased, the Trustee of the Gloria D. Foster Trust, and Mary Jane Little as life beneficiary under the estate and trust were party litigants in a contested suit in a state court of Texas in 1947 and 1948 involving the question of whether the Gloria D. Foster Estate and Trust was required to set aside to the trust corpus the allowable amounts for depletion and depreciation in the determination of the "net income" distributable under the trust to the life beneficiary, Mary Jane Little. The final judgment was rendered in this case on December 13, 1948 approving the actions of the estate and trust in retaining in the corpus the amounts for depletion and depreciation. Said judgment further ordered and directed the Trustee to set aside thereafter to the trust corpus the allowable amounts for depletion and depreciation, which court order necessarily constitutes an adjudication and directive with respect to the years 1949, 1950, 1951 and 1952 here involved in the instant tax case.

b. Respondent alleges that by virtue of such adjudication in the Texas court, the matter here at issue in this Docket No. 58688 has already been adjudicated, and the petitioner is now estopped from claiming tax deductions inconsistent with the property rights (and tax benefits flowing therefrom) of

the parties fully litigated and finally determined by said state court judgment.

/s/ NELSON P. ROSE,  
Chief Counsel, Internal Revenue  
Service.

Of Counsel: Melvin L. Sears, Regional Counsel; E. C. Crouter, Assistant Regional Counsel; R. E. Maiden, Jr., Special Assistant to the Regional Counsel; Donald P. Chehock, Attorney, Internal Revenue Service.

Served June 6, 1957.

[Endorsed]: T.C.U.S. Filed June 6, 1957.

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30 T. C. No. 98

Tax Court of the United States

Estate of Mary Jane Little, Deceased; Bank of America National Trust and Savings Association, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 58688

Filed July 21, 1958

### FINDINGS OF FACT AND OPINION

Held, that a testamentary trust, as modified by a later trust agreement, constitutes the "instrument creating the trust" within the provisions of subsections 23 (l) and 23 (m) of the Internal Revenue Code of 1939 and that under such instrument no portion of allowable deductions for depreciation and

depletion is allocable to petitioner, an income beneficiary of the trust.

William L. Kumler, Esq., for the petitioner.

Donald P. Chehock, Esq., for the respondent.

### Opinion

Mulroney, Judge: Respondent determined deficiencies in the petitioner's income tax as follows:

Year	Deficiency
1949 .....	\$22,899.07
1950 .....	23,909.64
1951 .....	29,912.41
1952 .....	30,731.00

The issue is whether the decedent, a life beneficiary under a trust, is entitled to a portion of the deductions for depletion and depreciation on the trust oil properties or whether the trust is entitled to the entire deduction for such items.

All the facts have been stipulated and are found accordingly.

Mary Jane Little died on or about September 10, 1953, a resident of Los Angeles County, California. Decedent filed her Federal income tax returns for the years 1949, 1950 and 1951 with the then collector of internal revenue and for the year 1952 with the district director of internal revenue for the sixth district of California, Los Angeles, California. The Bank of America National Trust and Savings Association is the duly appointed and acting executor of the Estate of Mary Jane Little, deceased.

Decedent was the mother of Gloria D. Foster, who died on or about July 30, 1943, a resident of Dallas County, Texas. For many years prior to her death, Gloria conducted an oil business, owning, operating, developing and maintaining many producing oil and gas leases in the East Texas oil field. At the date of her death in 1943 she owned undivided interests in approximately 84 producing oil wells in this field and in the physical equipment used in connection therewith. The oil income distributed to Mary Jane Little as beneficiary of the Gloria D. Foster Trust during the years here involved (from which depletion and depreciation deductions here at issue were taken) was derived from these oil properties, or other subsequently acquired similar oil properties.

The last will and testament of Gloria D. Foster, deceased, was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943. The will named L. C. Webster, Sol Goodell and T. A. Knight executors. After providing for a few specific bequests of cash and personal effects, the residue of Gloria's property was devised and bequeathed to L. C. Webster, T. A. Knight and Sol Goodell as trustees. The trust provisions of the will are contained in Article "V" and in this portion of the will said trustees were given broad authority and discretion in connection with the management of the corpus, investments and reinvestments. Paragraph 2 of Article V of the will provided, in part, that the "decision of trustees as to what property is corpus and what property is income of [the] estate, shall be final and binding on



all parties at interest hereunder. \* \* \*” The will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust. Paragraphs 8 and 9 of Article V of the will provided as follows:

8. Out of the net income of my estate I direct that Two Hundred (\$200.00) Dollars per month shall be paid to my faithful servant, Eva Culbertson, during her lifetime, and One Hundred (\$100.00) Dollars per month shall be paid to my mother-in-law, Mrs. Jeremiah Foster, during her lifetime and thereafter to my sister-in-law, Evelyn Foster, during her lifetime. All other net income from my estate shall be paid to my mother, Mary Jane Little, during her lifetime. If during any calendar year after the calendar year during which I die, while my mother is alive, the net income so paid my mother is less than Twelve Thousand (\$12-000.00) Dollars, I direct that at the end thereof trustees pay to her the difference out of the corpus of my estate if she so requests.

9. This trust shall terminate on the date of the death of my mother, Mary Jane Little. On termination of this trust, I direct that all the estate and properties constituting it that are then in the hands of trustees shall pass and vest in fees simple and by trustees shall be conveyed.

(a) one-half to Ann Armstrong Knight, if she then be living, and to her heirs per stirpes if she then be dead; and

(b) one-half to Marian Ralston Knight, if she

then be living, and to her heirs per stirpes if she then be dead.

The trustees named in the will accepted the trust and allocated to the corpus of the trust so much of the income of the trust after operating expenses but prior to any deductions for depreciation and depletion as was equal to the amount of depreciation and depletion allowable for Federal income tax purposes with respect to such income.

Decedent, Mary Jane Little, proposed to institute proceedings to contest Gloria's will dated April 19, 1943, relying upon the validity of a prior will dated September 8, 1942. For the purpose of settling the threatened will contest a contract and agreement, dated September 20, 1944, was entered into by and between the interested parties. The contract and agreement provided, in part, as follows: (a) that the purpose of the "contract and agreement is to settle, adjust and compromise all matters in issue or controversy between any and all of the parties hereto;" (b) that the trustees named under Gloria's will (dated April 19, 1943) were to resign as trustees, and others were to be appointed; (c) a trust agreement was to be entered into by all beneficiaries under the will, with changes in the power and duties of the new trustees, and with changes in the rights of the beneficiaries.

The trust agreement was executed by all the beneficiaries under date of November 14, 1944 and the old trustees resigned and were succeeded by the Mercantile National Bank at Dallas. Instead of the broad powers of disposition under the trust created

by the will, the new trustee (with specified exceptions) could not encumber or dispose of properties constituting corpus of the trust without the consent of the beneficiaries. In place of the former broad powers of reinvestment, the trustee under the new trust agreement was limited to investments in United States Government bonds, unless consent to invest otherwise was given by the beneficiaries. As contrasted with the broad discretion to determine "what portion of receipts of the estate shall be allocated to corpus of the estate, and what portion of such receipts shall be allocated to income of the estate" granted to the trustees under the will, the new trustee under the trust agreement was "to make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by said will." After the death of Mary Jane Little, and providing that neither she nor her assignees, heirs, representatives or any person claiming through her attacked the Gloria D. Foster will, then under the new trust agreement one-half of the then corpus of the trust was to be distributed to Ann Armstrong Knight and Marian Knight Rowe in equal shares, or to their heirs per stirpes, and the other half of the then corpus of the trust was to be distributed to the heirs, representatives, legatees or assigns of Mary Jane Little.

On September 30, 1947, a suit was brought in the district court of Dallas County, Texas, by L. C. Webster, Sol Goodell and T. A. Knight, as independent executors of the Estate of Gloria D. Foster,



deceased, against Mercantile National Bank at Dallas, as successor trustee of the Estate of Gloria D. Foster, deceased; Mary Jane Little, deceased; Talbot Shelton and Wharton E. Weems, as owners of one-half of the remainder interest in the estate; J. R. Bower, Jr., Ann Knight Bower, Frederick E. Rowe, Jr., and Marian Knight Rowe, as owners of the other half of the remainder interest in the estate. In their petition plaintiffs alleged that during the course of their administration they, as executors, had received proceeds from the sale of oil and gas from properties of the estate up to December 1, 1946, at which date the Mercantile National Bank at Dallas commenced collecting such proceeds; that they, as executors, had allocated to the corpus of the estate amounts representing "cost" depletion on oil produced and sold, together with depreciation on facilities, equipment, furniture, fixtures and the like, in accordance with practices employed by decedent, Gloria D. Foster, during her lifetime; that they, as executors, set forth such allocations of proceeds to corpus in their final account filed with the court, and they prayed that the court construe the will, particularly with reference to the meaning of the term "net income" as used therein, so as to approve their final account and to instruct them respecting the matter of what portion of funds in their hands represented net income and what portion was corpus and to discharge them from further liability and responsibility as executors.

In their answer the defendants, Ann Knight

Bower, J. R. Bower, Jr., Marian Knight Rowe and Frederick E. Rowe, Jr., interposed a cross action wherein they alleged that the issue of proper allocation of the proceeds of sale of oil and gas between income and corpus after December 1, 1946 by Mercantile National Bank at Dallas, trustee, was also in controversy as between themselves and Mary Jane Little and her assignees. The cross complainants requested declaratory relief to the effect that the Mercantile National Bank at Dallas, trustee, be ordered to compute and allocate to corpus depletion based on cost or 27½ per cent, whichever was greater, plus depreciation based on the methods used by decedent, Gloria D. Foster, during her lifetime. The court, by decision dated December 13, 1948, ordered, adjudged and decreed that L. C. Webster, Sol Goodell and T. A. Knight, as executors of the Estate of Gloria D. Foster, deceased, had properly computed depletion and depreciation and allocated correct and proper amounts to corpus for depletion and depreciation as shown by their final account. The court specifically found, in paragraph VIII of its decision, as follows:

In determining the "net income" of decedent's estate, defendant, Mercantile National Bank at Dallas, as Successor Trustee of the Estate of Gloria D. Foster, Deceased, in accordance with the law applicable to said estate at this time, and until otherwise directed by a court of competent jurisdiction, is authorized, required and directed to charge and set aside to corpus reserves for depreciation

on oil and gas lease equipment and machinery, and depletion, in the following manner:

(a) Depreciation: A reserve for depreciation on the oil and gas lease equipment and machinery belonging to said estate, commencing December 27, 1946, to be computed in the same manner and according to the same formula as the decedent did during her lifetime and as plaintiffs have done as shown by their final account, which reserve for depreciation shall be deducted from the proceeds of sales of runs of oil and gas produced by said estate subsequent to December 1, 1946, and set aside to corpus.

(d) Depletion: Out of the proceeds of oil and gas runs produced and sold and to be produced and sold from each oil and gas lease subsequent to December 1, 1946, compute, charge and set aside to corpus 27½% of the gross proceeds of such sales of runs from each lease (but not to exceed 50% of the net income from such lease after deducting the expense and carrying charges on such lease, including depreciation, but not including depletion).

Consistent with its judgment the court decreed that of the \$43,091.91 in custody of the executors, \$42,379.96 represented corpus of the Estate of Gloria D. Foster, deceased, and \$711.95 was net income of said estate. The executors, having previously paid the former sum to Mercantile National Bank at Dallas, trustee, and the latter to Mary Jane Little, deceased, were discharged and acquitted of all other claims arising out of their ad-

ministration. Mary Jane Little excepted to the judgment of December 13, 1948, in open court, and gave oral notice of appeal, but this appeal was not perfected by her and the judgment became final.

Sproles & Woodard, certified public accountants, were the accountants who kept the books and records of Gloria D. Foster and prepared her income tax returns. These same accountants continued to keep the books and prepare the income tax returns of the Gloria D. Foster estate and trust after her death during the entire period here involved. The books of Gloria D. Foster, while living, regularly and consistently made a charge against income and set up a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment in accordance with standard accounting principles. Subsequent to her death, the estate and trust have regularly and consistently set aside to corpus a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment. Depletion was computed on the basis of "cost" (which was the practice of Gloria D. Foster while living) by the executors and trustees from August 1943 to December 1946, and thereafter the trust has used "percentage" depletion. Deductions for depletion and depreciation were claimed in the Federal income tax returns, throughout, consistent with the books of Gloria D. Foster, and, later, the books of her estate and trust.

In filing income tax returns for the Gloria D.

Foster Trust, for the years here involved, the trustees computed and claimed as deductions the full amounts of allowable depletion and depreciation as follows:

Year	Depletion Claimed	Depreciation Claimed
1949.....	\$47,011.47	\$2,809.01
1950.....	47,348.24	2,552.21
1951.....	52,486.87	3,934.42
1952.....	52,478.44	4,205.44

Mary Jane Little, deceased, in her income tax returns for the years here involved, claimed a share of the deductions for depletion and depreciation allowable in respect of income of the Gloria D. Foster Trust. This share was computed as follows:

MARY JANE LITTLE—1949

Fiduciary Income

Gloria Foster Trust, Mercantile National Bank,  
Dallas, Texas

I. Net Income of Trust for 1949 per Spriles [sic] and Woodard .....	\$ 92,128.02	
Deducted in Determining Net Income:		
Depletion .....	\$ 47,011.49	
Depreciation .....	2,809.01	49,820.50
Net Income before depletion and depreciation .....		\$141,948.52
Distributed to Mary J. Little in 1949 .....	\$ 77,601.94	
Additional Amount distributable....	10,926.08	
Total distributable to Mary J. Little 1949 .....	\$ 88,528.02	\$ 88,528.02

Percentage of total distributable to Mary J. Little 62.3663%



II. Allocation of Income and of Deductions for Depletion and Depreciation

	Taxable Net Income Before Deductions	Deductions	Taxable Net Income
Mary Jane Little 62.3663%	\$ 88,528.02	\$ 31,071.20	\$ 57,456.82
Other beneficiaries 2.5361%	3,600.00	1,263.50	2,336.50
Trust 35.0976%	49,820.50	17,485.80	32,334.70
	<hr/>	<hr/>	<hr/>
Total 100%	\$141,948.52	\$ 49,820.50	\$ 92,128.02

III. Taxable to Mary  
Jane Little Be-  
fore Expense \$ 57,456.82  
Less Legal Expense 1,602.09

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Net Taxable \$ 55,854.73

A similar computation was made for each of the years 1950, 1951 and 1952, except for differences in the percentage of total distributable to Mary J. Little, deceased, in each of those years.

The issue is whether Mary Jane Little, deceased, a life beneficiary under the trust created by the will of Gloria D. Foster, was entitled to a portion of the deductions for depreciation and depletion on oil and gas properties held as trust corpus during the years 1949, 1950, 1951 and 1952 or whether the trust itself was entitled to both deductions in their entirety. The specific claim of petitioner is that Mary Jane Little was entitled to 62 per cent of the allowable depletion and depreciation tax deductions, which 62 per cent was the proportion of the income from the trust she received out of the total trust income computed prior to deductions for depletion and depreciation reserves. The issue is con-

trolled by two identical sentences appearing in subsections 23 (l) and 23 (m) of the Internal Revenue Code of 1939<sup>1</sup> providing that "in the case of property held in trust the allowable deductions shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each."

Petitioner's basic contention here is that the "instrument creating the trust" was the will of Gloria D. Foster, and that since this will contained no provisions for the apportionment of charges for depletion or depreciation between the trustee and the income beneficiaries, it follows that such charges must be apportioned on the basis of the trust income allocable to each.

Respondent argues the "instrument creating the trust" was the Foster will as modified by the trust agreement of 1944 and the latter agreement by reference to allocation to corpus "in accordance with the provisions of the law applicable at the time" contains a directive as to the apportionment of depreciation and depletion between the trustee and the income beneficiaries which must be followed and this directive gives the trust both deductions in entirety.

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<sup>1</sup>All section references are to the Internal Revenue Code of 1939, as amended, unless otherwise noted.



It is not absolutely clear that petitioner would prevail if the Foster will, standing alone, be accepted as the "instrument creating the trust." However, we do not feel we need examine the trust of the Foster will to see if, properly construed, there is or is not the required apportionment provision.

The Foster will trust was modified by the trust agreement of 1944 and it is the Foster will trust as so modified in 1944 that is the "instrument creating the trust" under which petitioner received the income during all of the years (1949 to 1952, inclusive) that are before us. If there be found in the Foster will trust as modified by the trust agreement of 1944, provisions for apportionment of depreciation and depletion deductions, then under the plain command of subsections 23 (l) and 23 (m), such provisions must be observed and the apportionment made "in accordance with the pertinent provisions of the instrument creating the trust."

The modification of 1944 made many changes in the Foster will trust but the one of interest here is that in paragraph 4, it removed the broad discretion of the trustee to allocate receipts to income and corpus and substituted a provision that the trustee "make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by said will."

The pertinent provisions of law applicable at this time were embodied in the Texas Trust Act. Acts

1943, 48 Leg., p. 232, ch. 148. This Act specifically provided for the rules to be followed, absent any specific provisions in the trust instrument, in the ascertainment of income and principal and in the apportionment of receipts and expenses between tenants and remaindermen. Section 27 of the Act provides that "All income after deduction of expenses properly chargeable to it, including reasonable reserves, shall be paid and delivered to the tenant \* \* \*." Section 33 of the Act dealing with the situation where the trust property consists of oil properties, such as were owned by the Gloria D. Foster trust, provides that in such a situation "Such percentage \* \* \* as is permitted to be deducted for depletion under the then existing laws of the United States of America for federal income tax purposes shall be treated as principal and invested or held for the use and benefit of the remainderman, and the balance shall be treated as income subject to be disbursed to the tenant or person entitled thereto \* \* \*."

The trust agreement of 1944, by reference to "the law applicable at the time", in paragraph 4, makes the foregoing statutory law of Texas a part of the agreement. It amounts to a provision of the trust instrument directing the apportionment of the allowable deductions between the income beneficiaries and the trustee, and the apportionment must be made in accordance with such provision. When we read the provisions of the foregoing statutory law of Texas into the trust agreement of 1944, it is

clear that the trust is entitled to take the depreciation and depletion deductions in their entirety.

Our view that the settlement agreement and the new trust agreement in 1944 must be considered as an integral portion of the instruments creating the trust is reinforced by the decision of the District Court of Dallas County, Texas in 1948. That court was called upon to approve a final accounting of the former trustees and also to decide the issue of the proper allocation to be made by the new trustee as to allocation of the proceeds of the sale of gas and oil between income and corpus. In reaching its decision interpreting the rights of various beneficiaries under the trust, the court followed the Gloria D. Foster will as modified by the new trust agreement of 1944. In our findings of fact we have set forth a portion of the court's decree that decided the issue of the cross action between the life income beneficiary, Mary Jane Little, and the remaindermen and trustee, Mercantile National Bank, as to the allocation of trust receipts. There the court determined the "net income" must be determined "in accordance with the law applicable to said estate at this time" and it in effect stated the applicable law was a direction to the trustee to allocate all depreciation and depletion to the trust. Mary Jane Little did not appeal from this decision.

Petitioner seems to imply that if we look beyond the borders of the original will we will be violating

the expressed intent of the testatrix. The argument is that if the testatrix "desired the trust instrument to have the effect for which respondent here contends, such effect could have been assured by a simple directive in the Will requiring the Trustees to set aside to corpus amounts equal to allowable depletion and depreciation. That she did not do so must be taken to mean that she did not intend to restrict the distribution of income to such an extent." However, if we were to look to the intent of the testatrix, we would arrive at a similar result. During her lifetime the books and records covering her oil operations show a regular and consistent charge against income, and a corresponding reserve for depletion of oil and gas properties and for depreciation of oil and gas equipment in accordance with standard accounting principles. This fact no doubt persuaded the Texas District Court to hold that when the testatrix in her will specified that the "net income" of the trust was to be paid to Mary Jane Little, the life beneficiary, she had in mind the trust receipts less the depletion and depreciation deductions.

Served July 21, 1958.

Decision will be entered for the respondent.

Tax Court of the United States  
Washington

Docket No. 58688

ESTATE OF MARY JANE LITTLE, Deceased,  
BANK OF AMERICA, NATIONAL TRUST  
AND SAVINGS ASSOCIATION, Executor,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed July 21, 1958, it is

Ordered and Decided: That there are deficiencies in income tax, as follows:

Year	Deficiency
1949 .....	\$22,899.07
1950 .....	23,909.64
1951 .....	29,912.41
1952 .....	30,731.00

[Seal]      /s/ JOHN E. MULRONEY,  
Judge.

Entered: July 21, 1958.

Served: July 23, 1958.



[Title of Tax Court and Cause.]

## PETITION FOR REVIEW OF DECISION OF TAX COURT

The above-named petitioner, by its counsel, Wilson B. Copes, hereby petitions for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on July 21, 1958, 30 T. C. . . . No. 98, determining deficiencies in the decedent's federal income taxes for the calendar years 1949, 1950, 1951 and 1952 in the respective amounts of \$22,899.07, \$23,909.64, \$29,912.41 and \$30,731.00, and respectfully shows:

### I.

The controversy relates solely to the question of the proper allocation of the deductions for depletion and depreciation between the **income beneficiary** and the fiduciary of a trust, the principal income of which was proceeds from the operation of oil producing properties. The question is governed by portions of Sections 23 (l) and 23 (m) of the Internal Revenue Code of 1939.

It was the decision of the Tax Court herein that the fiduciary was entitled to the entire deductions for depletion and depreciation and that the income beneficiary was entitled to none. It is the contention of the petitioner that the decedent was entitled to that portion of the total of such deductions which her distributable portion of the net

receipts of the trust bore to the total net receipts of the trust.

## II.

The review is sought before the United States Court of Appeals for the Ninth Circuit.

## III.

The petitioner's decedent at all times mentioned herein resided in the County of Los Angeles, State of California, and said decedent filed her income tax returns for the years here involved with the Collector or District Director of Internal Revenue at Los Angeles, Sixth District of California.

The place where the petitioner's decedent resided, and the place where the office of said Collector or District Director of Internal Revenue is located, are within the Circuit for the United States Court of Appeals for the Ninth Circuit, and said Court is the Court having jurisdiction of a review of the decision of the Tax Court herein under the provisions of Section 7482 of the Internal Revenue Code.

The decision of the Tax Court was entered herein on July 21, 1958, and the time for filing a Petition for Review will expire October 19, 1958.

Wherefore, your petitioner prays that a review be had of the decision of the Tax Court rendered in the above-entitled matter, and that upon such review said decision be reversed.



Respectfully submitted,

/s/ WILLIAM L. KUMLER,  
/s/ WILSON B. COPES,  
Attorneys for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed September 30, 1958.

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[Title of Tax Court and Cause.]

NOTICE OF FILING OF PETITION  
FOR REVIEW

To Arch M. Cantrall, Chief Counsel, Internal Revenue Service:

You are hereby notified that on September 30, 1958, Bank of America National Trust and Savings Association, as Executor of the Estate of Mary Jane Little, deceased, the petitioner herein, filed a Petition for Review of the Decision of the Tax Court heretofore rendered herein. There is delivered to you herewith a copy of the Petition so filed.

Dated: September 30, 1958.

/s/ WILSON B. COPES,  
Attorney for Petitioner.

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed October 3, 1958.

[Title of Tax Court and Cause.]

## CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review", excepting the original exhibits which are separately certified, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of December, 1958.

[Seal]

HOWARD P. LOCKE,

Clerk of the Court

/s/ By GERTRUDE W. COLL,

Deputy Clerk.

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[Endorsed]: No. 16308. United States Court of Appeals for the Ninth Circuit. Estate of Mary Jane Little, Deceased, Bank of America National Trust and Savings Association, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: December 19, 1958.

Docketed: December 31, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

1. Docket Entries of all proceedings before the Tax Court of the United States.

2. Pleadings before the Tax Court of the United States as follows:

(a) Petition.

(b) Answer.

(c) Amendment to Answer.

(d) Reply.

3. Stipulation of Facts, including the following exhibits: 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H (1) through (15), both inclusive.

4. Findings of Fact and Opinion of the Tax Court.

5. Decision of the Tax Court.

6. Petition for Review.

7. Notice of Filing Petition for Review.

8. Designation of Contents of Record on Review.

9. Statement of Points on Which Petitioner Will Rely.

10. This Designation of Record by Petitioner.

/s/ WILLIAM L. KUMLER,

/s/ WILSON B. COPES,

Attorneys for Petitioner.

[Endorsed]: Filed January 6, 1959. Paul P. O'Brien, Clerk.

In the United States Court of Appeals  
for the Ninth Circuit

Case No. 16308

ESTATE OF MARY JANE LITTLE, Deceased,  
BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION, Executor,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

STATEMENT OF POINTS ON WHICH  
PETITIONER WILL RELY

1. The Tax Court of the United States erred in concluding that the Texas Trust Act, Acts 1943, 48 Leg. p. 232, CH. 148, when read into a trust instrument "amounts to a provision in the trust instrument directing the apportionment of the allowable deductions between the income beneficiaries and the trustees \* \* \*" [Emphasis supplied] as such apportionment is contemplated by Sections 23 (1) and 23 (m) of the Internal Revenue Code of 1939.

2. The Tax Court of the United States erred in finding that the instrument creating the trust was the Foster Will as modified by the trust agreement of 1944.

3. The Tax Court of the United States erred in concluding that the manner in which the decedent, Gloria Foster, kept her books and records during her lifetime indicated a testamentary intention with respect to the allocation of deductions for depletion and depreciation.

4. The Tax Court of the United States erred in holding that there is a deficiency in the petitioner's federal income taxes for the following years in the following amounts:

Year	Deficiency
1949 .....	\$22,899.07
1950 .....	23,909.64
1951 .....	29,912.41
1952 .....	30,731.00

/s/ WILLIAM L. KUMLER,

/s/ WILSON B. COPES,

Attorneys for Petitioner.

[Endorsed]: Filed January 6, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

#### DESIGNATION OF RECORD BY PETITIONER

Pursuant to Rule 17(b) of this Court, petitioner does hereby designate the following for inclusion in the printed record.